United States Court of Appeals

for the Second Circuit

APPENDIX

74-1424 ORIGINAL

B P/S

In The

United States Court of Appeals

For The Second Circuit

JAMES CASHIN AS SECRETARY-TREASURER OF LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) ON BEHALF OF AND FOR THE BENEFIT OF ITS MEMBERS,

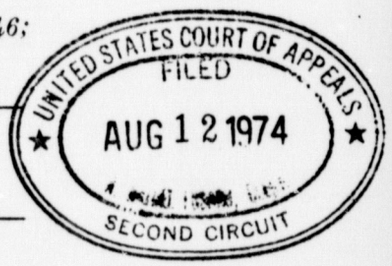
Plaintiff-Appellant,

vs.

WILLIAM SPENCER & SON CORP.,

Defendant-Appellee.

Appeal from a Summary Judgment in the United States District Court for the Southern District of New York at No. 72 Civ. 4946; Sat Below: Tyler, U.S.D.J. (without a jury).



APPENDIX

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TABLE OF CONTENTS

Appendix

Contents

TABLE OF CONTENTS

Appendix

DOCKET ENTRIES 1a

JUDGE TYLER

CIVIL DOCKET
[UNITE]D STATES DISTRICT COURT

Jury demand date: 72 CIV. 4946

106 Rev.

TITLE OF CASE	ATTORNEYS
[J]AMES CASHIN, as secretary-Treasurer of Local 1804-1, International Longshoreman's Association (A.F. OF L. - CIO) on behalf of and for the benefit of its members. vs WM. SPENCER & SON CORPORATION	For plaintiff: Rosenthal&Herman,P.C. 401 Bway,NYC10013 CA 6-7971 For defendant: KRISEL,BECK,HALBERG 12 John St.NYC10038 964-2651

[S]TATISTICAL RECORD		COSTS			DATE	NAME OR RECEIPT NO.	REC.	DISB.
[Fi]led	X	Clerk			11/2/72	Krisel, C.H.	15 —	
					11/21/72	[illegible]		15 —
					3/1/74	[illegible]	5 —	
[Fi]led	✓	Marshal			3/1/74	[illegible]		5 —
[S]ection: LABOR MANAGEMENT [RELATIO]NS ACT 1947 [29:18]1.60		Docket fee						
		Witness fees						
[Ca]se at:		Depositions						

Docket Entries

72 CIV. 4946

2a

PROCEEDINGS	Date Ord. Judgment
Filed petition of removal from the Supreme Court of N.Y. County of N.Y.	✓
Filed undertaking for removal in the sum of $1,000.00. Hartford Accident & Indeminity Co.	✓
Filed pltf. Interrogatories.	✓
Filed Deft's Affdvt&Notice of Motion for an order granting summary judgment to deft dismissing pltff's complaint,etc.as indicated ,ret.Rm 619,10/19/73, 2:15 P.M.	✓
Filed Memorandum of Deft.	✓
Filed Stip & Order adjourning deft's motion for summary judgment,etc. to 11/9/73.TYLER,J.	✓
Filed Stip & Order adjourning deft's motion for summary judgment to 11/9/73.TYLER,J.	✓
Filed Pltff s Affdvt in opposition by James Cashin.	✓
Filed Pltff s Memorandum of Law.	✓
Filed Pltff s Statement pursuant to Rule 9(g).	✓
Filed Pltff s Memorandum of Law.	
Filed MEMORANDUM OPINION#40317.Memers of Union not entitled to benefits asked for & because no other genuine issued of material fact,summary judgment granted in favor of deft. TYLER,J.	✓
Filed JUDGMENT.Deft.Wm.Spencer &Son Corp.have summary judgment against pltff dismissing complaint.Clk. (mn) ENT.1/4/74	
Filed Pltff s notice of appeal from final judgment entered in this action 2/1/74(mailed cop, to Krisel,Beck&Halberg on 3/4/74)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) on behalf of and for the benefit of its Members,

Plaintiff,

-against-

WM. SPENCER & SON CORPORATION,

Defendant.

72 Civil 4946 [HRT]

NOTICE OF MOTION

- -x

S I R S :

PLEASE TAKE NOTICE that the Undersigned will move this Court before the Hon. Harold R. Tyler, Jr., at the Courthouse, Room 619, of the United States District Court, Southern District of New York, Foley Square, in the Borough of Manhattan, City and State of New York, on the 19th day of October 1973 at 2:15 o'clock in the afternoon thereof or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the defendant dismissing plaintiff's Complaint, and for a further order enlarging defendant's time to answer interrogatories which plaintiff has propounded, pending a determination of this application for summary judgment, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 26, 1973

Yours, etc.,

KRISEL, BECK & HALBERG
Attorneys for Defendant

By _____

A Member of the Firm
Office and P.O. Address:
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES CASHIN, as Secretary-Treasurer of LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) on behalf of and for the Benefit of its Members,

Plaintiff,

-v-

WM. SPENCER & SON CORPORATION,

Defendant.

----------x

AFFIDAVIT

72 Civil 4946(H.R.T.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Alexander L. Torre, being duly sworn, deposes and says:

1. I am the Vice President of Wm. Spencer & Son Corporation, the defendant herein, and am fully familiar with the facts stated herein.

2. This affidavit is submitted in support of a motion by defendant (1) for summary judgment, and (2) for an enlargement of defendant's time to answer interrogatories which plaintiff has propounded, pending a determination of the application for judgment, since the burdensome task of preparing such answers will become unnecessary if judgment is granted.

3. For many years defendant (herein called Spencer) had employed "chenango" labor. The term "chenango" has a geographical etymology, and refers to casual longshore workers whom

Spencer had engaged on a day to day basis to assist in loading and unloading of non-self-propelled lighters in the Port of New York and vicinity.

For many years the men who perform this stevedoring work have been represented for collective bargaining by plaintiff Local 1804-1, International Longshoremen's Association (AFL-CIO), (herein called the "Union").

4. Spencer and a small group of other employers of "chenango" workers were members of a trade association named Harbor Carriers of the Port of New York. Since the number of employers in this group was small, each employer would be represented on a joint bargaining committee that negotiated the collective bargaining contracts with the Union. The business of this employer group has declined rapidly in recent years, and when the collective agreement on which the Union relies in this action was negotiated (covering the period from October 1, 1968 to September 30, 1971) the economic attrition of the employer group had reduced their number to Spencer alone.

Spencer, too, was compelled by economic business considerations to go entirely out of the stevedoring business in which "chenangos" are needed, and was completely out of that business by September 30, 1971, when its last contract with the Union expired.

5. The Union instituted this action as a class suit for the benefit of its members against Spencer in October 1972 in the New York Supreme Court, and Spencer removed the action to this Court on the ground that this Court has jurisdiction under Section 301(a)(b) and (c) of the Labor Management Relations Act 1947 (29 U.S.C., Section 185).

6. One of the problems with which the employers and the Union have had to contend is that employment has depended entirely on the fluctuating day-to-day need for "chenango" labor among the group of employers with whom the Union has had collective bargaining agreements. Hence, before Spencer had become the sole survivor in this small dying industry, a member of the Union would in all probability during the course of a contract year work for a number of different employers. Thus, the inherently casual nature of the "chenangos'" employment has dictated the inclusion in the collective agreements as one of the conditions precedent to entitlement to certain fringe benefits of a requirement that an employee shall have worked for a particular employer a specified minimal number of hours in the preceding contract year. But, as is hereinafter pointed out, this prerequisite was only one of several conditions annexed to entitlement to such a benefit.

The two claims asserted against Spencer in the Complaint relate (1) to paid holidays that occurred after Spencer had completely gone out of the business in which it had need for "chenango" workers and after its last collective agreement with the Union had expired; and (2) to an asserted contractual liability of Spencer for welfare benefits during the year after it had gone out of that business and after its Union contract had expired. Neither claim has any merit.

7. The Union asserts as a bare legal conclusion [Complaint, Paragraph 8] that "for the year 1971-1972" -- the year beginning October 1, 1971 -- "there is due and owing to

the plaintiff as and for paid holidays the sum of $114,361.60." Every "chenango" who became entitled to holiday pay while Spencer was in the business in which it employed "chenango" labor has been paid. Consequently, the claim for holiday pay made in this action is based on the theory that Spencer is contractually obligated for holiday pay for holidays that occurred after Spencer had ceased to employ any "chenango" labor and after its collective agreement had expired. There is nothing in the collective agreement, however, that lends support to so extravagant a theory. This contention is explicitly repudiated, moreover, by Section "7" of the contract as amended on February 23, 1970, which reads:

> "The following 12 paid holidays shall be granted for the period as of October 1, 1968 to September 30, 1970, as follows: Columbus Day; Armistice Day; Thanksgiving; Christmas; New Year's Day; Lincoln's Birthday; Washington's Birthday; Good Friday; Independence Day; Labor Day; Memorial Day and Election Day. Commencing October 1, 1970, an additional paid holiday to be agreed upon shall be granted to employees. Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year in which the holiday falls) *who work for the same employer not less than 4 hours in the work week in which the holiday falls;* such 4 hours to include any time worked on the holiday."
>
> (Italics ours)

Thus the holiday benefit is explicitly provided only for eligible employees who actually work for the employer at least four hours in the work week in which the holiday falls. This clearly negates an intention by the parties to extend liability for holiday pay to former employees after the company has gone

out of business and therefore employs no "Chenangos" "in the work week in which the holiday falls" (Contract, Exhibit "A", par. 7).

8. The second claim in the amount of $144,000. is for "welfare benefits for said period" [Complaint, Paragraph 9], i.e., the year beginning October 1, 1971. This claim, too, asserts that Spencer is contractually liable for contributions to the Welfare Plan (which is a typical Taft-Hartley Plan) referred to in the collective bargaining contract as "the Harbor Carriers of the Port of New York, International Longshoreman's Association (Ind.), Chenango Welfare Fund" (Contract, Exhibit "A", par. 5). Spencer paid in full all contributions due to the Trustees of that Fund while it remained in the business in which it engaged "chenango" labor, and the Complaint does not contend otherwise. Here, again, the claim is made that Spencer is liable under the expired collective agreement for contributions after it had gone out of that business and after its Union contract had expired. But the contract clearly repudiates any such a claim.

The only obligation of Spencer under its collective agreement in regard to providing welfare benefits is set forth in Paragraph 5(c), page 6, of the contract (a copy of which is attached and marked Exhibit "A"). This states:

> "Commencing as of October 1, 1968 and for each calendar year during the term of this agreement, each of the undersigned employers will pay over to the trustees of the Welfare Fund 36 1/2¢ per hour for the period from October 1, 1968 to September 30, 1969; 41 1/2¢

> per hour from the period from October 1, 1969 to September 30, 1970; and 49 1/2¢ per hour for the period from October 1, 1970 to September 30, 1971, *for each hour worked by an employee covered by this agreement for an Employer who is a contributor to the fund while such service is performed as an employee of such employer."*
>
> (Italics ours)

And in Paragraph (d) of the contract [Exhibit "A", page 6], the contract underscores that the obligation to contribute "for each hour worked" (Paragraph "c") is the sole obligation of the employer. The wording to this effect is as follows:

> "It is also agreed that neither the Association nor any member thereof shall be liable or responsible for the undertaking of any other Employer to make contributions to the Trustees under the aforesaid Welfare Fund, *the sole obligation of each of the undersigned Employers* is that it will make the contribution to the Welfare Fund that it has herein undertaken to contribute."
>
> (Italics ours)

Furthermore, no claim to the contrary has ever been made by the Trustees of the Welfare Plan.

Indeed, the premise for both claims asserted is seemingly the notion that Spencer had contracted with the Union not to go out of business for economic reasons not only during the term of the subsisting collective agreement but even for a full year after the contract had expired. This notion finds no support in the wording of the collective agreement and would be so costly an undertaking that only the most explicit wording could reasonably sustain the conclusion that the parties had so intended. I was a Trustee under the Welfare Plan and I represented Spencer when in February 1970, we modified the collective agreement to reduce the number of

hours worked as a condition to entitlement to Holiday pay from 10 to four hours, but significantly Spencer adamantly had refused to eliminate completely hours worked in the Holiday work week because it realized that it was in an economic cruch that would force it out of this business.

The premise of the Union, moreover, would be tantamount to reading into the contract an implication that Spencer had guaranteed to employ "chenangos" in the year following expiration of its collective agreement no fewer in number than it had employed in the last year of its Union contract, even though it had gone out of business. Again, there is absolutely nothing in the collective agreement to support so far-fetched an implication. No employer of "chenango" labor in his right mind would have given such a guarantee. The very nature of the fluctuating need for "chenango" labor repudiates any reasonable foundation for implying such an uneconomic and financially burdensome obligation.

In fact, if Spencer had continued to employ "chenango" labor after its collective agreement had expired under a renewal Union agreement on the same terms, the Union could not reasonably contend that it had to hire more "chenangos" than it needed to service its customers. This could mean that it might require only one-tenth or less of the number of men it had employed in the preceding contract year. Since the entire bargaining history of the employers and the Union shows that employment was casual in accordance with the daily need for such labor, how can it be argued that the collective agreement is a guaranty of future employment of "chenangos" after the employer has gone entirely out of the business. Attached as Exhibit "B" is a summary

of the number of hours worked for Spencer by "chenangos" for each of the eight contract years, and this graphically demonstrates the steady decline in Spencer's "chenango" employment.

For these reasons, we believe that neither the claim for holiday pay nor the claim for contributions to the joint welfare fund to which reference is made in the collective agreement presents a triable issue, and accordingly that summary judgment should be granted to defendant.

Alexander L. Torre

Sworn to before me
this 2nd day of ~~September~~ October 1973

HERBERT B. HALBERG
NOTARY PUBLIC, State of New York
No. 31-1630225
Qualified in New York County
Commission Expires March 30, 1974

Notary Public

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

CONTRACT AGREEMENT
between
HARBOR CARRIERS OF THE PORT OF NEW YORK
and
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, (AFL-CIO)
and
LOCAL 1804-1 I.L.A. (AFL-CIO)

Subject: CHENANGO LABOR

THIS AGREEMENT made and entered into this day of February, 1969 by and between the undersigned members of the HARBOR CARRIERS OF THE PORT OF NEW YORK as party of the first part and the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, (AFL-CIO) and LOCAL 1804-1 I.L.A. (AFL-CIO) as party of the second part, covering Chenangos in the loading and unloading of non self-propelled lighters, and car floats and railroad and freight cars on tracks, and palletizing of cargo and performing related work in the Port of New York and vicinity. This agreement shall remain in force and effect for the period as of and from October 1, 1968 to and including the 30th day of September, 1971.

1. (a) The regular or normal working day shall consist of eight (8) hours from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M. and the regular or normal working week shall consist of forty (40) hours made up of five (5) regular or normal working days from Monday to Friday inclusive.

(b) Meal hours shall be from 6 A.M. to 7 A.M., from 12 Noon to 1 P.M., from 6 P.M. to 7 P.M. and from 12 Midnight to 1 A.M.

(c) Legal Holidays shall be: New Year's Day; Lincoln's Birthday; Washington's Birthday; Good Friday; Decoration Day; Independence Day; Labor Day; Columbus Day;

Election Day; Armistice Day; Thanksgiving; Christmas and such other National or State Holidays as may be proclaimed by Executive Authority. Effective October 1, 1970, there shall be an additional holiday to be agreed upon.

2. (a) The straight-time or regular rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M., Monday to Friday inclusive.

(b) All other time, except meal time, shall be considered overtime and shall be paid for at the overtime rate of one and one-half times the straight-time or regular rate.

(c) The overtime rate shall be paid for the meal hour from 12 Noon to 1 P.M. Monday to Friday inclusive and shall continue to apply until men are relieved. All other meal hours, including the meal hours from 12 Noon to 1 P.M. on Saturdays, Sundays and legal holidays shall be paid for at an overtime rate of twice the straight time or regular rate for such meal hours only. The full meal hours shall be paid for at the meal hour rate if any part of the meal hour is worked.

3. The wage scale for the period of this agreement commencing as of and retroactive to October 1, 1968 for straight time and overtime on the classes of cargo below set forth, shall be as follows:

1. Effective as of October 1, 1968:

		Straight Time	Overtime
(a)	General Cargo of every description	$ 4.00	$ 6.00
(b)	Cement and Lime in bags	4.05	6.07 1/2

		Straight Time	Overtime
(c)	Wet hides, creosoted poles, ties, shingles, cashew oil, napthalene in bags and soda ash in bags	$ 4.15	$ 6.22 1/2
(d)	Refrigerated cargo	4.20	6.30
(e)	Kerosene, gasoline and naptha in cases and barrels when worked with a fly	4.20	6.30
(f)	Explosives	8.00	12.00
(g)	Damaged Cargo	8.00	12.00

2. Effective October 1, 1969:

		Straight Time	Overtime
(a)	General Cargo of every description	$ 4.25	$ 6.37 1/2
(b)	Cement and Lime in bags	4.30	6.45
(c)	Wet hides, creosoted poles, ties, shingles, cashew oil, napthalene in bags and soda ash in bags	4.40	6.60
(d)	Refrigerated Cargo	4.45	6.67 1/2
(e)	Kerosene, gasoline and naptha in cases and barrels when worked with a fly	4.45	6.67 1/2
(f)	Explosives	8.50	12.75
(g)	Damaged Cargo	8.50	12.75

Effective October 1, 1970:

		Straight Time	Overtime
(a)	General Cargo of every description	$ 4.60	$ 6.90
(b)	Cement and Lime in bags	4.65	6.97 1/2
(c)	Wet hides, creosoted poles, ties, shingles, cashew oil, napthalene in bags and soda ash in bags	4.75	7.12 1/2
(d)	Refrigerated Cargo	4.80	7.20

		Straight Time	Overtime
(e)	Kerosene, gasoline and naptha in cases and barrels when worked with a fly	$ 4.80	$ 7.20
(f)	Explosives	9.20	13.80
(g)	Damaged Cargo	9.20	13.80

4. As a condition of employment, all employees covered by this agreement shall, on or after the thirtieth day following the beginning of employment or thirty days after the date of execution of this agreement, whichever is later, become members of the International Longshoremen's Association, (AFL-CIO) and remain members during the term of this agreement. All employees who are members of the International Longshoremen's Association, (AFL-CIO) on the date of execution of this agreement, shall remain members during the term of this agreement. No employer shall be required by the International Longshoremen's Association, (AFL-CIO) to discharge an employee for reasons other than those set forth in the appropriate provision of the Labor Management Relations Act of 1947, as amended.

5. (a) The welfare plan evidenced by the agreement between the parties hereto dated November 15, 1955 and the Declaration of Trust dated October 28, 1955 for the calendar year 1956, between employer-members of the Harbor Carriers of the Port of New York and the International Longshoremen's Association, (Ind.), and known as the Harbor Carriers of the Port of New York, International Longshoremen's Association, (Ind.), Chenango Welfare Fund, shall be and hereby is extended to and including September 30, 1971.

(b) The employees who shall in each calendar year of this agreement be eligible for the benefits provided

in said Chenango Welfare Fund shall include only those:

(1) Who are employed by any of the undersigned employer-members of the Association 570 or more hours in the twelve month period ending September 30th of the preceding year; and

(2) Who are covered by this collective bargaining agreement; and

(3) Who have filed with such employer-member of the Association at its office a written application for benefits; and

(4) Who prior to the accrual of benefits (other than life insurance) have filed written application during the calendar year Januaryl through December 31 in which benefits accrue.

(5) The full time paid officers, delegates and employees of LOCAL 1804-1 I.L.A. (AFL-CIO) shall be included as those eligible for the benefits provided in said Fund upon the payment by said LOCAL 1804-1 to the Trustees of the said Fund of the sums set forth in Clause 5, paragraph (b), subdivision (6) hereof. No person hereunder shall be eligible for benefits unless the contributions required to be made into said Fund for his benefit shall have been made on his behalf.

(6) Local 1804-1 shall, for each calendar year of this agreement commencing as of and from October 1, 1968, pay over to the Trustees of the aforesaid Welfare Fund, the average cost incurred by the Fund per person for the calendar year immediately preceding the year in which payments are being made for each person hereby included in the said Fund under Clause 5, paragraph (b), subdivision (5) hereof. In determining such cost each year, there shall be

included all payments made by the Trustees for welfare benefits, insurance contracts, medical benefits and treatment, salaries, rent, administration expenses, accountants and legal fees, Social Security, Unemployment Insurance and any other miscellaneous expenses and costs relative to the operation of the fund.

(7) The parties have also agreed that no eligible employee who is entitled to receive the benefits afforded by the said Welfare Plan by reason of his employment with a particular employer during a measuring year shall under any circumstances be entitled to receive further benefits by reason of his employment by another Employer-member of the Association during the same measuring year.

(c) Commencing as of October 1, 1968 and for each calendar year during the term of this agreement, each of the undersigned employers will pay over to the trustees of the Welfare Fund 36 1/2¢ per hour for the period from October 1, 1968 to September 30, 1969; 41 1/2¢ per hour for the period from October 1, 1969 to September 30, 1970; and 49 1/2¢ per hour for the period from October 1, 1970 to September 30, 1971, for each hour worked by an employee covered by this agreement for an Employer who is a contributor to the fund while such service is performed as an employee of such employer.

(d) It is also agreed that neither the Association nor any member thereof shall be liable or responsible for the undertaking of any other Employer to make contributions to the Trustees under the aforesaid Welfare Fund, the sole obligation of each of the undersigned Employers is that it will make the contribution to the Welfare Fund that it has herein undertaken to contribute.

6. Vacation: For 570 hours worked for any one Company for the fiscal year October 1st to September 30th - 1 weeks vacation pay. For 890 hours worked for any one Company for the fiscal year October 1st to September 30th - 2 weeks vacation pay. A third week vacation with pay for longer-time regular employees (defined as employees who have worked at least 570 hours for one employer herein in five of the six years preceding the eligibility year) and who have worked at least 1150 hours for such employer herein in the eligibility year. A fourth week vacation for employees who have worked and received payment for not less than 570 hours per year in each of the immediately preceding 12 fiscal years, or has been granted on e week's vacation pay, in 10 of the immediately preceding 12 fiscal years, and who have worked for such employer at least 1150 hours in the eligibility year. A fifth week vacation for employees who have worked and received payment for not less than 570 hours per year in each of the immediately preceding 12 fiscal years, or has been granted one week's vacation pay, in 10 of the immediately preceding 12 fiscal years and who have worked for such employer at least 1150 hours in the eligibility year. Effective with the fiscal year commencing October 1, 1969, a sixth week vacation for employees who have worked and received payment for not less than 570 hours per year in each of the immediately preceding 12 fiscal years, or has been granted one week's vacation pay, in 10 of the immediately preceding 12 fiscal years and who have worked for such employer at least 1150 hours in the eligibility year. Vacation pay shall be at the wage rate prevailing during the fiscal year of earned eligibility. For disputed and hardship cases a review of 520

hours - 1 week and 850 hours - 2 weeks. No review shall be had for the third to sixth week vacation. This review is to be based on work record, service in the Armed Forces, illness or other hardship conditions. The ruling of a committee, which shall consist of two members appointed by the Harbor Carriers and two members appointed by the union, shall be final and binding.

7. The following 12 paid holidays shall be granted for the period as of October 1, 1968 to September 30, 1970, as follows: Columbus Day; Armistice Day; Thanksgiving; Christmas; New Year's Day; Lincoln's Birthday; Washington's Birthday; Good Friday; Independence Day; Labor Day; Memorial Day and Election Day. Commencing October 1, 1970, an additional paid holiday to be agreed upon shall be granted to employees. Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 10 hours in the work week in which the holiday falls; such 10 hours to include any time worked on the holiday.

8. (a) Men hired in the morning, Monday through Sunday, shall receive 4 hours guaranteed pay for the period between 8 A.M. and 12 Noon.

(b) Men hired at 8 A.M. and who are re-hired at 1 P.M. shall be entitled to a two hour minimum in the afternoon. Men re-hired at 1 P.M. shall continue at work until the completion of the loading or unloading of the lighter during the normal working day, weather and other conditions permitting. No work shall continue after 5 P.M. unless ordered by the employer.

(c) Men not hired until 1 P.M. shall receive four hours guaranteed pay.

(d) Hiring periods shall be 8 A.M. and 1 P.M. Except as to men hired to discharge newsprint, all extra men hired shall be hired at designated places to be agreed upon between the parties.

(e) Men hired at 7 P.M. shall receive a minimum of 4 hours overtime and if ordered back at 1 A.M. - 4 hours overtime.

(f) When men are knocked off five minutes after the hour or later they shall be paid for one-half hour and when knocked off thirty-five minutes after the hour they shall be paid for 1 hour.

(g) If men work through the supper hour (6 P.M. to 7 P.M.) and continue to work after 7 P.M. they shall be guaranteed a minimum of two hours from 7 P.M. to 9 P.M. at the overtime rate.

9. (a) Minimum number of men in a gang shall be four (4) exclusive of machine driver, and shall remain intact at all times. This condition to apply while freight is being worked at a steamship pier in connection with a steamship operation, except as hereafter stated:

(b) When local deliveries and pickups are involved, the number of employees used shall be at the discretion of the employer except when using a tractor, one man in addition to a driver for each tractor shall be used.

10. Flexibility for the shifting of gangs is permitted within designated work areas to be agreed upon between the parties. However:

(1) If men are shifted from one work area to another they shall receive a minimum of 8 hours pay. If the work continues to 5 P.M. they shall receive an additional one hours pay at straight time. Any work performed after 5 P.M. shall be paid for as set forth in Paragraph 8. No shifting of gangs shall be permitted until after the 1 P.M. hiring period.

(2) Shifting of men to fill out the eight (8) hour maximum shall not be construed as a means of delaying the start of work in one area waiting for gangs in another area to finish. Nor shall a foreman in one area knock off a gang, in order to replace them with a shifting gang from another area.

(3) Such gang shall not be shifted to deprive men of work who are usually employed and available in such area to which the gang is shifted.

11. Machine drivers on steady payroll basis shall receive the same hourly increase as the General Chenango workers. Overtime shall be paid at the regular hourly overtime rate.

Machine drivers who are extras shall come under provisions of item eight (8) listed above. Shifting of extra machine drivers to different piers or terminals shall be confined to the district foremen's section.

All machine drivers when hired as such shall be used exclusively for the driving and maintenance of their machines and will not handle cargo manually or be interchanged

into the gang at the expense of another man.

Extra drivers shall be paid travelling time to and from the garage and when shifting to different piers at the regular hourly rate and under the terms of item 8(f).

12. Each employer shall contribute to the N.Y.S.A.-I.L.A. (AFL-CIO) Pension Fund 57¢ per hour for each hour worked by employees covered by this agreement while employed by the undersigned employer for the period from October 1, 1968 to September 30, 1969, and 70¢ per hour for each hour worked by employees covered by this agreement while employed by the undersigned employer for the period from October 1, 1969 to September 30, 1970; and 75¢ per hour for each hour worked by employees under this agreement while employed by the undersigned employer for the period from October 1, 1970 to September 30, 1971.

13. When hazardous and penalty cargoes are being worked adequate safety facilities shall be maintained by the Companies and any gear needed to insure the safety of the men working shall be supplised by the Companies.

14. Arbitration: In the event of any grievances the following steps shall be taken in order to equitably settle such grievances:

FIRST STEP: International Longshoremen's Association, (AFL-CIO) Chenango Steward and hiring foreman will discuss the matter jointly. If they cannot agree, then;

SECOND STEP: International Longshoremen's Association, (AFL-CIO) Delegate and Management Representatives will discuss the matter jointly. If they cannot agree, then;

THIRD STEP: Labor Relation Committee: Two (2) Representatives from Harbor Carriers, two (2) Representatives from the International Longshoremen's Association, (AFL-CIO) for joint meeting. If a majority cannot agree, then;

FOURTH STEP. Arbitration. The arbitrator or arbitrators shall be selected by the Labor Relations Committee by unanimous vote. The decision of the arbitrators so selected shall be final and binding on both parties. All expenses of the arbitration shall be borne equally between the parties.

15. Each of the employer-members as well as the International Longshoremen's Association, (AFL-CIO) shall in the event of repeated violations of this agreement invoke disciplinary action, in the case of the employer on its employee only, and in the case of the Union on its members only, except if any party is not satisfied as the disciplinary action, the parties shall discuss the same among themselves. If they cannot agree, the matter shall be arbitrated under the "Fourth Step" (Paragraph 14).

16. The employers recognize the right of the employees to have a spokesman on the piers and to this end the employer recognizes the International Longshoremen's Association, (AFL-CIO) and its Local 1804-1 I.L.A. (AFL-CIO) Chenango Steward, who must be an employee of one of the undersigned employer-members, as the spokesman for the grievances or disputes of the men on the piers, in accordance with Paragraph 14. Such Chenango Steward shall not demand or receive any special privileges but he shall perform his work for his employer at all times except when a grievance arises. Any grievance shall be handled and disposed of in the manner provided for in Paragraph 14.

17. During the life of this agreement the party of the first part agrees there shall be no lockouts or work stoppages by the employers but this shall not be construed to mean a lay off of employees due to business conditions, and the party of the second part agrees there shall be no strikes or work stoppages. Any grievance, dispute, controversy or claim arising out of or relating to this agreement, or the interpretation or application of any of its provisions, shall be handled and disposed of in the manner provided for in Paragraph 14. The right of employees not to cross a bona fide picket line is recognized by the employers.

18. Each employer-member shall, as heretofore, be liable alone for all payments under this agreement and the performance of its terms. Neither the HARBOR CARRIERS nor any member shall be personally liable or responsible for any obligation of any other member of the HARBOR CARRIERS for any payments for any purpose under this agreement or for default by any member under this agreement.

19. The undersigned employers shall continue to deduct from the wages of its employees the sum fixed as the membership dues of the Union provided that such employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of this agreement, whichever occurs sooner.

20. The wages of employees employed by employer-members of the Association shall continue to be paid weekly by check.

21. When men are specifically ordered out from Hoboken or Jersey City for work at Bayonne, Port Newark and

Greenville, Lehigh Valley, Claremont Terminal, Caven Point or Bayway, they shall receive the equivalent of one hour's pay at the straight time rate plus cost of transportation unless transportation is provided by the employer.

22. Schedule of drafts: In the case of the following commodities only the following limits of weight shall apply: Palletizing bags of coffee for lighterage:

(a) Thirty bags limit on each pallet for Santos Coffee. Where thirty bags are used on each pallet, a premium payment of 10¢ per hour shall be paid to men in gang.

(b) Twenty-four bags limit on each pallet for Columbia Coffee.

(c) When hand trucking bags weighing 100 pounds each, the number of bags on each hand truck shall not exceed five.

(d) When hand trucking bags weighing 200 pounds each, the number of bags on each hand truck shall be three.

(e) When hand trucking Castor beans in bags, the number of bags on each hand truck shall be six, in which case there shall be two men to the hand truck.

23. A system of seniority among employees shall be discussed and agreed upon between the parties.

24. The employers shall make adequate arrangements to relieve tractor drivers. Any dispute as to what is adequate arrangements for relief shall be dealt with in accordance with Paragraph 14 hereof.

25. This Collective Bargaining Agreement shall remain in force and effect as of and from October 1, 1968 until and including September 30, 1971. This agreement shall be automatically renewed after September 30, 1971 from year to year (or by agreement for any longer period) unless at least 60 days before the said expiration date, or the expiration date of any renewal period, written notice of termination is given by registered mail by either party to the other, addressed if given by the employers, to International Longshoremen's Association, (AFL-CIO), at 17 Battery Place, New York City, New York, and Local 1804-1 I.L.A. (AFL-CIO) at 403 Greenwich Street, New York City, New York, and if given by the Union to Harbor Carriers of the Port of New York at 17 Battery Place, New York City, New York, Room 1110.

FOR THE PARTY OF THE FIRST PART

Harbor Carriers of the Port of New York

By _____
Executive Vice President

Wm. Spencer & Son Corporation

By _____
Vice President

FOR THE PARTY OF THE SECOND PART

International Longshoremen's Association, (AFL-CIO)

L.S.
By THOMAS W. GLEASON
President

Local 1804-1 I.L.A. (AFL-CIO)

L.S
By RICHARD KENNY
President

L.S
By JAMES J. CASHIN
Secretary-Treasurer

Exhibit A - Contract Agreement

AMENDMENT OF FEBRUARY 23, 1970 TO
COLLECTIVE AGREEMENT

Agreement made this 23rd day of February 1970 by and between the Harbor Carriers of the Port of New York, and International Longshoremen's Association (AFL-CIO) and Local 1804-1 ILA (AFL-CIO).

Whereas, on February 20, 1969 an agreement in writing was duly entered into between the parties above named covering Chenangoes in the loading and unloading of lighters as appears by said agreement; and

Whereas, the parties desire to amend said agreement as hereinafter set forth:

Now, therefore, it is agreed as follows:

First: Paragraph 7 of the said Contract Agreement is amended to provide that commencing February 23, 1970 to and including September 30, 1971, paid holidays shall be granted to regular employees who work for the same employer not less than 4 hours in the work week in which the holiday falls. Such 4 hours shall include any time worked on the holiday; and said paragraph shall read as follows as of February 23, 1970:

"7" "The following 12 paid holidays shall be granted for the period as of October 1, 1968 to September 30, 1970 as follows: Columbus Day; Armistice Day; Thanksgiving; Christmas; New Year's Day; Lincoln's Birthday; Washington's Birthday; Good Friday; Independence Day; Labor Day; Memorial Day and Election Day. Commencing October 1, 1970, an additional paid holiday to be agreed upon shall be granted to employees. Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for

the same employer not less than 4 hours in the work week in which the holiday falls; such 4 hours to include any time worked on the holiday."

Second: Effective as of February 23, 1970 and to and including September 30, 1971 each employer shall pay into a special fund the sum of 5¢ per hour for all hours actually worked by employees except coopers, as well as all hours actually worked by steady outside personnel and for whom contributions are made to the Welfare & Pension Funds under this agreement. The employers shall not be required to contribute for Vacation and Holiday payments. The Fund shall be under the custody of the respective employers.

The parties hereto shall agree when the respective Funds shall be distributed to the employees of the employers which shall not be later than September 30, 1971. Distribution of the Funds shall be limited to such employees who have worked not less than 570 hours for one employer in the fiscal years ending September 30, 1970 and September 30, 1971.

Third: During the term of the collective bargaining agreement as amended herein and dated February 20, 1969 there shall be no demand by the Union or its Locals for collective bargaining negotiation on any matter or issue not covered by this agreement, or for renegotiation of any provisions of the said agreement, except as may be specifically contained in the collective bargaining agreement.

Fourth: The collective bargaining agreement as amended herein shall continue in full force until September 30, 1971.

Exhibit A - Contract Agreement 29a

FOR THE PARTY OF THE FIRST PART

Harbor Carriers of the Port of New York

By _____
Executive Vice President

Wm. Spencer & Son Corporation

By _____
Vice President

FOR THE PARTY OF THE SECOND PART

International Longshoremen's Association, (AFL-CIO)

By _____
President

Local 1804-1 I.L.A. (AFL-CIO)

By _____
President

By _____
Secretary-Treasurer

SCHEDULE OF EMPLOYMENT
OF "CHENANGO" LABOR BY
WM. SPENCER & SON CORPORATION

Calendar Year	Hours Worked
1964	742,908
1965	658,820
1966	657,808
1967	582,786
1968	494,612
1969	400,711
1970	340,885
To 9/30/71 (End of Contract)	212,361

EXHIBIT - STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JAMES CASHIN, as Secretary-Treasurer of LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) on behalf of and for the benefit of its Members,

Plaintiff,

-against-

WM. SPENCER & SON CORPORATION,

Defendant.

72 Civil 4946 [HRT]

- -x

STATEMENT PURSUANT TO RULE 9(g)
OF THE GENERAL RULES OF THIS COURT

There is no genuine issue as to the following material facts:

1. The plaintiff is a local union affiliated with the International Longshoremen's Union.

2. The defendant was and is a New York corporation.

3. That the plaintiff and the defendant are parties to a collective bargaining agreement covering the period from October 1, 1968 to and including September 30, 1971, under which defendant employed members of the plaintiff union.

4. That a true copy of the collective bargaining agreement together with an amendment to said agreement, dated February 23, 1970, is annexed to this Notice of Motion.

5. That said collective bargaining agreement and the amendment thereto, dated February 23, 1970, are the only agreements entered into between plaintiff and defendant for the period October 1, 1968 to and including September 30, 1971, and fully set forth the rights and obligations between plaintiff and defendant.

6. That all benefits accruing to the plaintiff under the said collective bargaining agreement for the period October 1, 1968 to and including September 30, 1971, have been paid by the defendant, and the defendant has fully complied with the collective bargaining agreement as amended during the life of the contract.

7. The collective bargaining agreement terminated by its own terms on September 30, 1971.

8. Defendant did not renew its collective bargaining contract with the plaintiff after September 30, 1971, having discontinued its stevedoring business at the time of the termination of the collective bargaining agreement on September 30, 1971.

TO: ROSENTHAL & HERMAN
Attorneys for Plaintiff
Office and P.O. Address:
401 Broadway
New York, New York 10013
Telephone: 212/226-7971

KRISEL, BECK & HALBERG
Attorneys for Defendant

By Herbert B. Halberg

A Partner of the Firm
Office and P.O. Address:
55 Liberty Street #705
New York, New York 10005
Telephone: 212/964-2651

AFFIDAVIT OF JAMES CASHIN IN OPPOSITION TO MOTION
(Filed November 7, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L. - C.I.O.) on behalf of and for the benefit of its Members,

Plaintiff,

- against -

WM. SPENCER & SON CORPORATION,

Defendant.

----------x

AFFIDAVIT IN OPPOSITION

72 Civil 4946 (H.R.T.)

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JAMES CASHIN, being duly sworn, deposes and says:

1. I am Secretary-Treasurer of Local 1804-1 of the International Longshoremen's Association (A.F. of L. - C.I.O.), the plaintiff herein; I am fully familiar with the facts and circumstances of this case and I submit this affidavit in opposition to the defendant's motion (1) for summary judgment, and (2) for an enlargement of defendant's time to answer plaintiff's interrogatories heretofore served on defendant.

2. The defendant's motion should be denied for the following reasons:

(a) There exist substantial questions of fact herein in that the course of dealing between plaintiff and defendant clearly indicates that all benefits earned in any one year were paid to employees in the following year;

(b) Defendant's request for enlargement of time to respond to plaintiff's interrogatories, if granted, would completely thwart plaintiff's ability to show the aforementioned course of dealing.

3. As was always the custom of operation between our Union and the defendant, benefits earned by our men were always paid to them in the following year. The method of operation was such that the men

qualified in the first year and received payment therefor the second year.

4. Each man listed in the schedule annexed to plaintiff's Complaint stood ready, willing and able to perform work for the defendant-employer in the year following the expiration of the contract. The unilateral act of the defendant in terminating its stevedore business should in no way defeat the defendant's contractual liability. Defendant's failure to provide work for men of the plaintiff-Union is no defense which can avoid liability as to payment.

5. The defendant's reasoning can only bring us to the conclusion that the defendant alone has the power to defeat its employees' ability to comply with any later conditions as set forth in the collective bargaining agreement in question. Certainly, this was never the understanding or intention of any of the parties. If defendant's reasoning were accepted, then an employer could have men working for him for one year, for example, the last year of a contract, without having to pay those employees their benefits as earned. He could simply defeat the employees' claims for benefits by either going out of business or not renewing a contract. This result is, of course, absurd, and was never the intention of the parties to the agreement.

6. Our claim is not, as defendant states, that the defendant "had contracted with the Union not to go out of business for economic reasons not only during the term of the subsisting collective agreement but even for a full year after the Contract had expired"; our claim is simply that the defendant cannot foreclose the employees' ability to their accrued benefits by the employer's termination of his business. Any other result would unjustly enrich the employer, who has already had the benefit of the man-hours performed in the prior year.

7. Defendant's additional request to enlarge the time for its response to plaintiff's interrogatories would, if granted, impair our ability to further present to this Court the history of dealings between the Union and the defendant. By circular reasoning, defendant asks for

a delay pending the resolution of the summary judgment question which, if such delay be granted, would only strengthen its own case. It is clear, however, that such responses to interrogatories are much needed for plaintiffs to oppose this very motion. Additionally, it should be pointed out, oral examinations could best determine what was the custom here between employer and Union. The granting of defendant's motion at this stage of the proceedings, without its answers to our interrogatories or oral examinations, would completely cut off plaintiff's ability to oppose the instant motion.

8. In any event, the course of dealing between the parties, and their interpretation of the contract in question, can only be determined at a full hearing and not on papers. To do otherwise, would do great prejudice to the 214 men involved.

Accordingly, for the reasons above stated, defendant's motion should be denied, or in the alternative, held in abeyance pending completion of discovery procedures.

Sworn to before me this
7th day of November, 1973.

S/
JAMES CASHIN

IRVING SHAFRAN
Notary Public, State of New York
No. 24-3607935
Qualified in Kings County
Commission Expires March 30, 1975

a delay pending the resolution of the summary judgment question which, if such delay be granted, would only strengthen its own case. It is clear, however, that such responses to interrogatories are much needed for plaintiffs to oppose this very motion. Additionally, it should be pointed out, oral examinations could best determine what was the custom here between employer and Union. The granting of defendant's motion at this stage of the proceedings, without its answers to our interrogatories or oral examinations, would completely cut off plaintiff's ability to oppose the instant motion.

8. In any event, the course of dealing between the parties, and their interpretation of the contract in question, can only be determined at a full hearing and not on papers. To do otherwise, would do great prejudice to the 214 men involved.

Accordingly, for the reasons above stated, defendant's motion should be denied, or in the alternative, held in abeyance pending completion of discovery procedures.

Sworn to before me this
7th day of November, 1973.

S/
JAMES CASHIN

IRVING SHAFRAN
Notary Public, State of New York
No. 24-3607935
Qualified in Kings County
Commission Expires March 30, 1975

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT ANNEXED TO FOREGOING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L. - C.I.O.) on behalf of and for the benefit of its Members,

Plaintiff,

- against -

WM. SPENCER & SON CORPORATION,

Defendant.

72 Civil 4946 [H.R.T.]

----------x

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT

There is a genuine issue as to the following material facts:

1. That for the period October 1, 1971 to September 30, 1972, the defendant has not paid the plaintiff any of the benefits accrued pursuant to the collective bargaining agreement between the parties, to wit, the paid holidays and welfare benefits.

Dated: New York, New York

ROSENTHAL & HERMAN, P.C.
Attorneys for Plaintiff
Office & P.O. Address
401 Broadway
New York, New York 10013
Tel: 212-226-7971

TO: KRISEL, BECK & HALBERG
Attorneys for Defendant
55 Liberty Street
New York, New York 10005

MEMORANDUM DECISION
(Filed January 31, 1974)

V 37a

Memo - Decision

FILED
JAN 31 4 57 PM '74
S.D. OF N.Y.
U.S. DISTRICT COURT

#me

#40317

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A. F. of L. - C. I. O.) on behalf of and for the benefit of its members,

Plaintiff,

-against-

WM. SPENCER & SON CORPORATION,

Defendant.

----------X

MEMORANDUM

72 Civ. 4946 HRT

FILED
FEB 1 1974

TYLER, D.J.

The plaintiff ("the Union") commenced this suit against defendant in the Supreme Court of New York, New York County, in October, 1972. Thereafter, defendant ("Spencer") removed this action to this court on the ground that the subject matter of the controversy presents a federal question or questions under § 301(a), (b) and (c) of the Labor Management

Relations Act, 29 U.S.C. § 185(a), (b) and (c). Defendant thereafter moved for summary judgment dismissing the action on the merits, which relief is granted for reasons to be discussed hereinafter.

In its complaint, the Union asserts two claims described as follows: (1) Spencer owes the Union members a total of $114,361.60 for "paid holidays" for the fiscal year beginning October 1, 1971, the year after the effective expiration of the collective bargaining agreement; and (2) Spencer owes the sum of $144,000.00 by way of contributions to the welfare plan, which sum is said to be required by the terms of the collective bargaining agreement for the year commencing October 1, 1971. Upon oral argument of the motion of defendant for summary judgment, the Union abandoned the second claim summarized above.

The former collective bargaining agreement here pertinent covered the labor of a much storied group known as the Chenagoes upon the waterfront of New York Harbor. Time and events of modern shipping have in effect brought about circumstances where labor of the Chenagoes is no longer required in the Port of New York. Not surprisingly, Spencer, the last employer in this port of Chenago labor, was forced to dissolve and go out of business at the time when the collective bargaining agreement expired by its terms. It should be

noted that this agreement covered the term or period from October 1, 1968 through September 30, 1971. Thus, as indicated, defendant effectively went out of business as of the last day of that particular period.

In deciding this motion for summary judgment it is useful to state the basic principles that govern such a motion. According to Rule 56(c), a motion for summary judgment is only to be granted if it is determined that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This has been held to mean that the district court must take the view of the evidence most favorable to the opponent of the movant and give that opponent the benefit of all favorable inferences that may reasonably be drawn, with all doubts as to the existence of any material fact being resolved against the moving party. Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962). Applying these standards to this case, the motion of the defendant for summary judgment will be granted.

There is no dispute in this case as to what the relevant provision of the contract is. As amended on February 23, 1970, Paragraph 7 of the contract provides in relevant portion as follows:

> "Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending

September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 4 hours in the work week in which the holiday falls; such 4 hours to include any time worked on the holiday." 1/

The 1970 amendments to the collective bargaining agreement did not extend its termination date beyond the existing date of September 30, 1971. The quoted provision on its face establishes two conditions for the receipt of holiday pay. These are that the employee must have worked at least 570 hours for the employer in the preceding contract year and that the employee work at least four hours in the work week in which the holiday falls for that employer.

The Union argues that although its members have not worked at all during the period involved in this suit because Spencer went out of the stevedoring business, its members are still entitled to payment for the holidays during that year. The basic contention of the Union is that in year one of the contract the employees, by working the 570 hours, get vested rights in the following year to holiday pay. So even

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1/ The initial contract provided for a minimum of ten hours of work for the employer in the week in which the holiday fell.

though the contract had expired and Spencer had ceased employing Chenangoes the preceding year, the Chenangoes were still entitled to holiday pay for the year starting October 1, 1971 because of their work the preceding year. The argument of the plaintiff would have some potential validity if only the 570 day requirement were stated. Arguably, it then would be ambiguous under the contract whether an employer who went out of business would be required to give holiday pay to employees who had worked 570 hours the previous year. In such a situation the court would look to such extrinsic evidence as the conduct of the parties, the statements of their representatives and their past practice to aid its interpretation of the contract. United Electrical, Radio & Machine Wkrs. v. General Electric Co., 208 F. Supp. 870, 872 (S.D.N.Y. 1962); Humble Oil & Refining Co. v Local Union 866, 271 F. Supp. 281, 285 (S.D.N.Y. 1967); International Union of Mine, Mill & Smelter Workers, Local 515 v. American Zinc, L&S Co., 311 F.2d 656, 660 (9th Cir. 1963). But the argument ignores the second condition of the contract which states that the benefits are to be paid only if the employee works for the employer for at least four hours in the week in which the holiday falls. This provision of the contract is

unambiguous. In such a situation the court should give the words of the contract their clear, plain and ordinary meaning. Independent Oil Workers at Paulsboro, N.J. v. Mobil Oil Corp., 441 F.2d 651, 653 (3d Cir. 1971).

The next question is whether there are any other genuine issues of material fact. The Union only claims in its statement, pursuant to General Rule 9(g) of this court, that there is a genuine issue of material fact as to whether Spencer has paid the benefits to the employees during the year starting October 1, 1971. This fact is not in dispute. Spencer concedes that no such payments have been made. Spencer rests on the claim that they are not required to make such payments because the requirements of the collective bargaining agreement have not been met. As stated before, this interpretation, in my view, is correct.

Since under the terms of the collective bargaining agreement the members of the Union are not entitled to the benefits asked for here and because there are no other genuine issues of material fact, summary judgment is granted in favor of defendant.

Dated: January 31, 1974

U.S.D.J.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES CASHIN, AS SECRETARY-TREASURER OF LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F.L.-C.I.O.) ON BEHALF OF AND FOR THE BENEFIT OF ITS MEMBERS,

Plaintiff,

-against-

WM. SPENCER & SON CORPORATION,

Defendant.

----------x

Defendant having moved the Court for summary judgment dismissing the complaint on the merits, and the said motion having come on to be heard before the Honorable Harold R. Tyler, Jr., United States District Judge, and the Court thereafter on January 31, 1974, having handed down its memorandum decision granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, WM. SPENCER & SON CORPORATION, have summary judgment against the plaintiff, JAMES CASHIN, AS SECRETARY-TREASURER OF LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Judgment

(A.F.L.-C.I.O.) ON BEHALF OF AND FOR THE BENEFIT OF ITS MEMBERS, dismissing the complaint.

Dated: New York, N. Y.
February 1, 1974

s/ Raymond F. Burghardt
Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

Notice is hereby given that JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F.of L. - C.I.O.) on behalf of and for the benefit of its members, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 1st day of February, 1974.

Dated: New York, New York

February 28, 1974

ROSENTHAL & HERMAN, P.C.
Attorneys for Plaintiff

By: Irving Shafran
401 Broadway
New York, New York
10013

KRISEL, BECK & HALBERG
55 Liberty St.
N.Y. N.Y.
Attys for Def't

SUMMONS

C 199—Summons without Notice, Supreme Court. 4-64
Personal or Substituted Service.

Supreme Court of the State of New York
County of NEW YORK

JAMES CASHIN, as Secretary-Treasurer of LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) on Behalf of and for the Benefit of its Members

Plaintiff

against

WM. SPENCER & SON CORPORATION

Defendant

Index No.

Plaintiff designates New York *County as the place of trial*

The basis of the venue is plaintiff's place of business

Summons

Plaintiff resides at 403 Greenwich St., New York City
County of New York

To the above named Defendant

You are hereby summoned *to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.*

Dated, October 2, 1972

Deft's address:
19 Rector Street
New York City

ROSENTHAL & HERMAN

Attorney(s) for Plaintiff
Office and Post Office Address

401 Broadway
New York, N.Y. 10013
Tel.: 226-7971

the Harbor Carriers of the Port of New York and the International Longshoremen's Association (AFL-CIO) and Local 1804-1 I.L.A. (AFL-CIO), of which the defendant was a signatory, covering in particular "Chenango labor", those members of the Local who worked in any one year were entitled to vacation benefits, paid holiday benefits and welfare benefits for the next ensuing year.

5. That on the 30th day of September, 1971 the defendant failed to negotiate or renew its contract with the plaintiff.

6. That during the period October 1, 1971 to September 30, 1972 the plaintiff's members were ready, willing and able to perform their duties pursuant to the terms of the contract and were prevented from performing same because of the acts of the defendant.

7. That annexed hereto and made part hereof with the same force and effect as though more fully at length set forth herein, is a list of the names of those members of the plaintiff union entitled to benefits which were due to be paid by defendant.

8. That for the year 1971-1972 there is due and owing to the plaintiff as and for paid holidays the sum of $114,361.60.

9. That there is due and owing to the plaintiff from the defendant for the welfare benefits for said period the sum of $144,000.

10. That no part of said sums have been paid although duly demanded.

11. That the plaintiff has duly performed all the terms and conditions of the aforesaid agreement on its part to be performed except as prevented by the acts of the defendant.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $258,361.60, with interest thereon from September 30, 1972, together with the costs and disbursements of this action.

ROSENTHAL & HERMAN
Attorneys for plaintiff
401 Broadway
New York, N.Y. 10013

Complaint

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JAMES CASHIN, being duly sworn, deposes and says that deponent is the Secretary-Treasurer of LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F.L.-CIO), the plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true. This verification is made by deponent because plaintiff is an affiliated local union. Deponent is an officer thereof, to wit, its Secretary-Treasurer.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: contracts in deponent's possession.

JAMES CASHIN
JAMES CASHIN

Sworn to before me this
3rd day of October, 1972

Notar Public

ANSWER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -x

JAMES CASHIN, as Secretary-Treasurer of LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) on behalf of and for the Benefit of its Members

Plaintiff

-against-

WM. SPENCER & SON CORPORATION

Defendant

- -x

Index No.
23931/72

ANSWER

Defendant, WM. SPENCER & SON CORPORATION (hereinafter "SPENCER") by its attorneys, KAISEL, BECK & HALBERG, for its Answer to the complaint herein,

1) Admits the allegations contained in paragraphs numbered "1", "2" and "5" of the complaint.

2) Denies each and every allegation contained in paragraphs numbered "3", "4", "6", "7", "8", "9" and "11" of the complaint.

3) Admits that no part of the sums demanded in the complaint have been paid, but except as so admitted denies each and every allegation in paragraph number "10" of the complaint.

Answer

AS A FIRST AND PARTIAL DEFENSE, DEFENDANT, SPENCER, ALLEGES:

4) Defendant and plaintiff Union were parties to a collective bargaining agreement covering the period from October 1, 1968 to and including September 30, 1971, under which defendant employed members of the plaintiff Union. Under the terms of said collective agreement defendant agreed to make contributions to a Welfare Fund administered by a board of trustees established for the benefit of employees in the bargaining unit covered by said collective agreement. The terms and conditions of defendant's undertaking were set forth in paragraph 5 (c) of the collective agreement as follows:

> "Commencing as of October 1, 1968 and for each calendar year during the term of this agreement, each of the undersigned employers will pay over to the trustees of the Welfare Fund 36 1/2¢ per hour for the period from October 1, 1968 to September 30, 1969; 41 1/2¢ per hour for the period from October 1, 1969 to September 30, 1970; and 49 1/2¢ per hour for the period from October 1, 1970 to September 30, 1971, for each hour worked by an employee covered by this agreement for an Employer who is a contributor to the fund while such service is performed as an employee of such employer."

Answer

5) For business reasons, defendant SPENCER discontinued its stevedoring business in connection with which it employed members of the plaintiff Union prior to September 30, 1971, the date on which said collective agreement expired by its terms. For this reason defendant did not enter into any renewal collective agreement with plaintiff.

6) Throughout the period of the aforesaid collective agreement covering the period from October 1, 1968 to and including the terminal date thereof, to wit September 30, 1971, defendant SPENCER paid in full all contributions due to the trustees of the aforesaid Welfare Fund required of it by said collective agreement and is not indebted to said Welfare Fund in any amount for contributions.

7) The only obligation assumed by defendant in respect of providing welfare benefits to its employees in the bargaining unit covered by said collective agreement was to make the contributions to said Welfare Fund as aforesaid.

AS AND FOR A SECOND PARTIAL DEFENSE, DEFENDANT, SPENCER, ALLEGES:

Answer

8) Defendant and plaintiff entered into a collective bargaining agreement covering the period from October 1, 1968 to and including September 30, 1971. Under said collective agreement, defendant employed members of the plaintiff Union to perform stevedoring services in connection with customers marine lighterage work in the Port of New York.

9) Paragraph "7" of the aforesaid collective agreement provides that employees in the bargaining unit covered by the agreement should be entitled to certain paid holidays in the period from October 1, 1968 to and including September 30, 1971. In pertinent part paragraph "7" provides,

> ". . . Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 10 hours in the work week in which the holiday falls; such 10 hours to include any time worked on the holiday."

Answer

10) Defendant has paid all of its employees in full for all of the enumerated paid holidays to which they were entitled under said collective agreement that occurred within the period of said collective agreement, to wit from October 1, 1968 to and including September 30, 1971. Defendant is accordingly not indebted to any of said employees for holiday pay under said collective agreement.

WHEREFORE, defendant prays that a final judgment be entered herein dismissing the complaint herein, and awarding defendant its costs and disbursements.

Dated: New York, New York
November 16, 1972

KRISEL, BECK & HALBERG
Attorneys for Defendant

Office and Post Office Address:
12 John Street
New York, New York 10038

Telephone: 212/964-2651

Answer

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JAMES M. CLARKE, being duly sworn, deposes and says:

That he is the Executive Vice President of WM. SPENCER & SON CORPORATION, the Defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his knowledge except as to m tters stated therein to be alleged on information and belief and that as to those matters he believes it to be true.

Sworn to before me this
16th day of November, 1972 James M Clarke

Robert B Fallon

NOTARY [illegible]
Qualified [illegible] County
Commission Expires March 30, 1973

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

CASHIN,

Plaintiff-Appellant,

against

SPENCER & SON CORP.,

Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Laurel N. Huggins, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 9th day of August 1974, deponent served the annexed Appellant's Appendix upon Keisel, Beck & Halberg attorney(s) for Appellee in this action, at 55 Liberty St., New York the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 9th day of August 1974

Laurel N. Huggins

Print name beneath signature

LAUREL N. HUGGINS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975